Nos. 93-1456 and 93-1828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, *et al.*,
Petitioners

v.

RAY THORNTON, *et al.*,
Respondents

STATE OF ARKANSAS ex rel. WINSTON BRYANT,
Attorney General of the State of Arkansas,
Petitioner

v.

BOBBIE E. HILL, *et al.*,
Respondents

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR THE STATE PETITIONER

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QUESTION PRESENTED

Amendment 73 to the Arkansas Constitution restricts access to the ballot for certain candidates for the offices of United States Representative and Senator. Amendment 73 provides that a person who has been elected to three or more terms as a member of the United States House of Representatives, or to two or more terms as a member of the United States Senate, cannot thereafter have his or her name placed on the ballot for that office, although a candidate may still be elected through a write-in campaign. The question presented by this case is the following:

Whether a State has the power under the Elections Clause of the Constitution, Art. I, § 4, Cl. 1, to restrict an incumbent candidate's access to the ballot in such a manner, or whether the Qualifications Clauses of the Constitution, Art. I, § 2, Cl. 2, and § 3, Cl. 3, prohibit a State from imposing such a ballot access restriction.

PARTIES TO THE PROCEEDING

The following parties appeared in the court below:

Petitioner:

State of Arkansas ex. rel. Attorney General Winston Bryant

Respondents:

Bobbie Hill, individually and on behalf of the Arkansas League of Women Voters; Dick Herget, individually

State Constitutional Officers:

W. J. "Bill" McCuen, Secretary of State; Julia Hughes Jones, State Auditor; Jimmie Lou Fisher, State Treasurer; Winston Bryant, Attorney General; Charlie Daniels, Land Commissioner, individually and in their capacities as candidates for public office

United States Senators:

Dale Bumpers and David Pryor

United States Representatives:

Ray Thornton, Blanche Lambert, Jay Dickey and Tim Hutchinson; and former representatives Beryl Anthony, Bill Alexander and John Paul Hammerschmidt

Members, Arkansas State Legislature, former and current:

Senate:

James C. "Jim" Scott, W. D. "Bill" Moore, Jr., Mike Ross, Wayne Dowd, Neely Cassady, George Hopkins, Jean C. Edwards, Jay Bradford, Bill Walters, Travis A. Miles, Lu Hardin, Eugene "Bud" Canada, Charlie Cole Chaffin, Vic Snyder, Jerry D. Jewell, Cliff Hoofman, Stanley Russ, Mike Beebe, Roy C. "Bill" Lewellen, Mike Everett, Steve Bell, Allen Gordon, Jon S. Fitch, Morril Harriman, Mike Bearden, Jerry

P. Bookout, Mike Todd, Nick Wilson, Steve Luelf, Joe E. Yates, David R. Malone, Clarence Bell, Jack Anderson Gibson, Max Howell, John Pagan, Kevin Smith, Jim Keet, Bill Gwatney, and Reid Holiman

House:

Railey A. Steele, Jerry E. Hinshaw, Louis McJunkin, Charles W. Stewart, Bob Fairchild, Jerry Hunton, Edward F. Thicksten, B. G. Hendrix, Carolyn Pollan, Ralph "Buddy" Blair, Jr., Jerry D. King, W. R. "Bud" Rice, Ode Maddox, Gus Wingfield, Hoye D. Horn, David Beatty, Arthur Carter, Charles Whorton, Jr., Frank J. Willems, Lloyd R. George, Keith Wood, Bob J. Watts, L. L. "Doc" Bryan, Bruce Hawkins, Ted E. Mullenix, James C. Allen, John W. Parkerson, Bob "Sody" Arnold, Judy Smith, John H. Dawson, Billy Joe Purdom, Roger L. Rorie, Randy Thurman, W. H. "Bill" Sanson, Bill Stephens, Larry Mitchell, H. Lacy Landers, Veo Easley, Bobby G. Newman, Jodie Mahony, Phil Wyrick, Myra Jones, Jim Argue, Jr., William L. "Bill" Walker, Jr., Mark Pryor, Irma Hunter Brown, Carol "Coach" Henry, James G. Dietz, Doug Wood, Mike Wilson, William H. Townsend, Larry Goodwin, John E. Miller, John Paul Capps, J. Sturgis Miller, Josetta E. Wilkins, Jacqueline J. Roberts, Charlotte Schexnayder, Jimmie Don McKissack, Michael K. Davis, Thomas G. Baker, Albert "Tom" Collier, V. O. "Butch" Calhoun, Wanda Northcutt, James T. Jordan, N.B. "Nap" Murphy, Jim Holland, Tim Woolridge, Bobby G. Wood, Bobby L. Hogue, Owen Miller, J. L. "Jim" Shaver, Pat Flanagin, Wayne Wagner, Walter M. Day, Christine Brownlee, Ben McGee, Lloyd C. McCuiston, Jr., Bob McGinnis, Ernest Cunningham, Jimmie L. Wilson, Bynum Gibson, Tim Hutchinson, James Edward "Ed" Gilbert, Richard L. "Dick" Barclay, Bill D. Porter, Tommy E. Mitchum, James H. "Jim" Roberts, William P. "Bill" Mills, Robert Vaughan "Bob" Teague, David E. Roberts, Arthur

"Art" Givens, Jr., Jack H. McCoy, Robert Wayne "Bobby" Tullis, John M. Lipton, G. W. "Buddy" Turner, Tom Forgey, Travis Dowd, Dana A. Moreland, Jim Von Gremp, Dave Bisbee, Randy Bryant, John Hall, Jim Hill, Dennis Young, Armil O. Curran, D. R. "Buddy" Wallis, Vada Sheid, Greg Wren, E. Ray Stalnaker, Mark Riable, Dee Bennett, Joe Molinaro, David Choate, Bill Fletcher, Marian D. Owens, and Claud V. Cash

Others:

George O. Jernigan, Asa Hutchinson, Lula Binns, Shirley McFarlin, Richard Bifford and Bonnie Johnson, as members of the Arkansas State Board of Election Commissioners

Republican Party of Arkansas

Democratic Party of Arkansas

Arkansans for Governmental Reform, Inc., and Lawrence Cook, Timothy Jacob, Steve Munn, Tim Epperson, Lance Curtis, Miles King, David Jamison, Sy Mendenhall, Teresa Ulrey, Eual Petty, Tommy Munn, Tommy White, Dr. Bill McCollum, Richard Trubey, Leo Perry, Bruce Burks, Howard Studdard, J.D. Crow and Claudie Ray Ollar

U.S. Term Limits, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley

Americans for Term Limits and Steve Goss

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On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR THE STATE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas, 93-1456 Pet. App. (hereinafter Pet. App.) 1a-43a, is reported at 316 Ark. 251, 872 S.W.2d 349. The opinions of the circuit court, Pet. App. 45a-52a, 53a-62a, are unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on March 7, 1994. A petition for rehearing was denied on March 14, 1994. Pet. App. 44a. The petition in No. 93-1456 was filed on March 18, 1994, and the petition in No. 93-1828 was filed on May 16, 1994. Both petitions were granted and consolidated on June 20, 1994. The jurisdiction of this Court rests under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent constitutional provisions are reprinted in App. A, *infra*.

STATEMENT

1. At issue in this case is whether the Constitution allows the States to structure their electoral procedures for the offices of United States Representative and Senator in order to ensure that the institutional advantages of incumbency (particularly long-term incumbency) neither create nor perpetuate modern-day legislative fiefdoms that, by crippling the ability of challengers to unseat officeholders, render the political process unresponsive to the electorate. The Framers of the Constitution envisioned frequent turnover for legislative offices, especially for the House of Representatives, whose members must stand for re-election biennially. For most of our history, the Framers' prediction was correct. But in recent decades, incumbents in the federal, state, and local political systems have been re-elected at an unprecedented—and, to some, alarming—rate.[1] In response to that trend, since 1990 more than 22 million votes have been cast in 15 States to enact state laws through citizen initiatives that either prohibit individuals from holding congressional office for more than a fixed number of terms or that restrict access

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[1] Charts depicting that trend in Arkansas and nationwide are reprinted in App. I, *infra*.

to the ballot by incumbents, while still permitting them to be elected via write-in campaigns.

Starting in 1990, States began to experiment (more accurately, *re*experiment) with term limits and, subsequently, ballot access laws as a way of addressing real and perceived flaws in today's electoral process. In that year, Oklahoma adopted a state constitutional amendment limiting legislative terms, while California and Colorado went a few steps further. California limited the terms of all statewide elected officials, including legislators, and Colorado imposed a 12-year cap on its delegates' service in Congress. In 1991, Washington voters rejected the retroactive imposition of term limits on state and federal officeholders, but the following year the voters approved a prospective ballot access law. Also in 1992, citizens in 13 other States approved laws imposing term limits on elected state and federal officials or (in different ways) restricting incumbents' opportunity to appear on the ballot. Sula P. Richardson, *Term Limits for Federal and State Legislators* 3-5 (CRS Report Mar. 28, 1994).

This case involves the constitutionality of one of the latter type of election laws. At the November 1992 general election, the Arkansas electorate, by a 60% to 40% margin, endorsed an initiative adopting Amendment 73 to the Arkansas Constitution. Amendment 73 limits the terms that can be held by certain state officers, such as the Governor, Lieutenant Governor, and Attorney General.[2] Amendment 73 also provides that a person who has been elected to three or more terms as a member of the United States House of Representatives, or to two or more terms as a member of the United States Senate, cannot thereafter have his or her name placed on the

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[2] State offices are not governed by the Qualifications Clauses of Article I, which apply only to United States Representatives and Senators. The Arkansas Supreme Court upheld the term limits imposed by Amendment 73 on state officers, and that aspect of the ruling below is not before the Court.

ballot for that office, although a candidate may still be elected through a write-in campaign. Amendment 73 rests on the belief, as stated in its preamble, that "elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people." The Amendment was designed to rectify the deleterious effects of "[e]ntrenched incumbency," which have included "reduced voter participation and an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers." The question presented by this case is whether the Elections Clause of the Constitution, Art. I, § 4, Cl. 1, and the Tenth Amendment permit the State to remedy those ills through Amendment 73, or whether the Qualifications Clauses, Art. I, § 2, cl. 2, and § 3, Cl. 3, prohibit Arkansas from pursuing such corrective action.

2. In November 1992, respondents Bobbie E. Hill, *et al.*, filed a complaint in the Circuit Court of Pulaski County, seeking a declaratory judgment that Amendment 73 to the Arkansas Constitution was unconstitutional under Articles I and IV of the Constitution of the United States and the First and Fourteenth Amendments, insofar as Amendment 73 impaired the ability of an incumbent Representative or Senator to be re-elected. On cross-motions for summary judgment, the circuit court held that Amendment 73 violated state law and the Qualifications Clauses of the Constitution, Art. I, § 2, Cl. 2, and § 3, Cl. 3. Pet. App. 45a-52a, 53a-62a. The court reasoned that "[Amendment 73] is purely and simply a restriction on the qualifications of a person seeking federal congressional office," *id.* at 49a, and that the Qualifications Clauses forbid States from imposing qualifications on federal officeholders in addition to the ones set forth in Article I, *id.* at 48a-49a.[3]

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[3] The circuit court rejected respondents' contentions that Amendment 73 violated Article IV of the Constitution, as well as the First and Fourteenth Amendments. Pet. App. 59a, 60a.

3. By a divided vote, the Arkansas Supreme Court affirmed in part and reversed in part. Pet. App. 1a-43a. The Court held that Amendment 73 is not invalid under state law, but does violate Article I of the Constitution.

a. A plurality concluded that the historical background to the adoption of the Qualifications Clauses was "helpful" but ultimately "inconclusive regarding the issue at hand." Pet. App. 12a. Nevertheless relying, inter alia, on that history and *Powell* v. *McCormack*, 395 U.S. 486 (1969), the plurality reasoned that Article I "enumerated three benchmarks for congressional service—age, citizenship, and residency"—and that "[n]o other qualifications were included." *Id.* at 12a. That conclusion is a sensible one, the plurality wrote, since it ensures that the qualifications for Representatives and Senators are uniform nationwide. *Id.* at 14a.

The plurality also ruled that Amendment 73 cannot be upheld as an exercise of the State's power to regulate candidates' access to the ballot. Pet. App. 14a-15a. The plurality reasoned that the intent and effect of Amendment 73 "are to disqualify congressional incumbents from further service" by superimposing "[a]n additional qualification" atop the ones already specified in Article I: *viz.*, "prior service." *Id.* at 15a. The plurality acknowledged that the Amendment does not "totally disqualif[y]" incumbents from becoming officeholders, since an incumbent can run as a write-in candidate for such an office. *Id.* But "[t]hese glimmers of opportunity" were, according to the plurality's view, too "faint" to "salvage Amendment 73 from constitutional attack." *Id.* Finally, because Amendment 73 violated the Qualifications Clauses, the plurality determined that the Amendment could not be upheld under the power reserved to the States by the Tenth Amendment. *Id.*

In separate opinions, Justices Dudley and Brown concurred in the ruling that Amendment 73 violates the Qualifications Clauses. Pet. App. 26a-27a, 41a-42a. Justice

Dudley stated that Amendment 73 is unconstitutional because the Framers rejected term limits for Representatives and Senators when drafing the Constitution and because allowing States to impose additional qualifications beyond the ones specified in Article I "is antithetical to republican values." *Id.* at 26a. He acknowledged that whether the ballot access limitations imposed by Amendment 73 are constitutional "is a close question and difficult issue," *id.*, but he ultimately found the limitations invalid under Article I, because "as a practical matter, write-in candidates are at a distinct disadvantage" in an election, *id.* at 27a. Justice Brown also noted that "the issue is not entirely free from doubt," but, he, too, ultimately concluded that the Framers had considered and rejected term limits for legislative offices when drafting Article I. *Id.* at 41a. The advantages of having uniform, nationwide qualifications for federal offices, he added, fortified his conclusion. *Id.* at 41a-42a.[4]

b. Justices Hays and Cracraft dissented. Pet. App. 33a-35a, 37a-39a. According to Justice Hays, the Tenth Amendment guarantees States the right to structure their own forms of government and, in so doing, to set qualifications for candidates to state or federal offices as long as those requirements do not violate the Qualifications Clauses. Since those Clauses fix only "the *minimum* requirements rather than the *exclusive* requirements," *id.* at 34a, States may add additional qualifications under state law, *id.* at 34a-35a. Justice Cracraft determined that the ballot access restrictions set by Amendment 73 are not "qualifications" for purposes of Article I, because they do not bar an elected candidate from holding office

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[4] The Arkansas Supreme Court did not address the question whether, as applied to federal office, Amendment 73 violates Article IV of the Constitution or the First and Fourteenth Amendments. That court did address whether the term limits imposed on state officials violated the First or Fourteenth Amendments, and held that they do not.

if he receives the majority of votes cast. *Id.* at 37a. Relying on *Hopfmann* v. *Connolly*, 746 F.2d 97 (1st Cir. 1984), vacated in part on other grounds, 471 U.S. 459, reaffirmed on remand, 769 F.2d 24, 25 n.1 (1985), cert. denied, 479 U.S. 1023 (1987), and *Joyner* v. *Mofford*, 706 F.2d 1523 (9th Cir.), cert. denied, 464 U.S. 1002 (1983), Justice Cracraft stated that "the test to determine whether or not the restriction amounts to a qualification within the meaning of Article I, Section 3, is whether the candidate could be elected if his name were written in by a sufficient number of electors." Pet. App. 38a (internal punctuation omitted). Amendment 73 passed that test, he determined, since "[u]nder our liberal write-in laws, an incumbent can be elected to congressional office and, if elected, serve the term for which elected." *Id.* at 37a.

SUMMARY OF ARGUMENT

I. States have broad power under Article I and the Tenth Amendment to regulate federal elections, and they have exercised that power throughout our history. For example, States have imposed district residency requirements on Representatives and have required federal officials to be qualified voters, which excludes felons and the mentally incompetent. Term limits and ballot access laws are also legitimate, historically-based, judicially-approved regulations that are designed to even the playing field between incumbents and challengers, and ultimately to enhance the responsiveness of delegates.

II. States can regulate the voting process, even if such regulations may exclude some candidates from office. Amendment 73 excludes long-term incumbents from the ballot, but still permits them to be elected via write-in votes. The amendment thus is a reasonable regulation of ballot access, since it does not disqualify an incumbent from holding office as a matter of law.

III. States can impose qualifications on federal office atop the ones listed in Article I. The Qualifications Clauses deny certain persons the right to hold federal elected office; the Clauses do not guarantee anyone the right to campaign for such office. The text of Article I and its drafting history show that the Qualifications Clauses are not exclusive. *Powell* also does not control this case. *Powell* held only that each House cannot add new qualifications to Article I, not that the States are barred from doing so.

ARGUMENT

AMENDMENT 73 TO THE ARKANSAS CONSTITUTION IS A LAWFUL EXERCISE OF STATE AUTHORITY OVER THE ELECTORAL PROCESS

The Arkansas Supreme Court held Amendment 73 unconstitutional by focusing on the Qualifications Clauses without considering the Elections Clause or Tenth Amendment. That approach was mistaken. The Constitution contains numerous provisions establishing the electoral process, and the entire fabric of law must be read as a whole. *Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968). Those provisions make clear that, as explained in Point I, just as States can regulate elections for state office, *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2400-03 (1991), so, too, can States regulate federal elections. Term limits and ballot access restrictions are a legitimate exercise of that authority. Moreover, as explained in Point II, States can regulate access to the ballot even if doing so excludes some candidates from office. *Storer* v. *Brown*, 415 U.S. 724, 728-37, 746 n.16 (1974). Amendment 73 is best viewed as a permissible ballot access regulation and should be upheld for that reason. Finally, even if Amendment 73 is deemed to impose qualifications on office, States can impose qualifications for federal office in addition to the ones listed in Article I, as explained in Point III. The judgment of the Arkansas Supreme Court should therefore be reversed.

I. STATES HAVE BROAD POWER UNDER THE ELECTIONS CLAUSE AND THE TENTH AMENDMENT TO REGULATE FEDERAL ELECTIONS

A. States Have The Power To Regulate The Electoral Process For State And Federal Officials

1. *States have the inherent power to regulate state elections*

Throughout our history, the States have exercised their authority to regulate their own electoral processes; none has left elections to the free market. Regulation of the electoral process began during the colonial and revolutionary periods, App. B, *infra*, and continues today. All 50 States have constitutional or statutory eligibility prerequisites for state office. For example, 41 States have minimum age or residency requirements for governor or state legislator. Other typical restrictions are the exclusion of convicted felons from eligibility, *e.g.*, Ark. Const. Art. 19 § 3; *id.* Amend. 51, § 11(4), and limitations on the eligibility of civil servants for elected office, such as so-called "resign to run" laws.[5] Other common regulations include

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[5] The ban in this nation on felons holding office reaches back to at least 1661, when the Governor of Maryland ordered local sheriffs to restrain felons from holding office. Albert Edward McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* 60 (1905); see 1 Charles Seymour & Donald Paige Frary, *How the World Votes* 234 (1918). Today, 37 States bar at least some convicted felons from holding or seeking office for the period of their imprisonment or disability, or for some period thereafter. *Developments in the Law: Elections*, 88 Harv. L. Rev. 1111, 1218-19 n.9 (1975); Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vanderbilt L. Rev. 929, 987-997 (1970); see, *e.g.*, Cal. Penal Code § 424 (Deering 1985); Ga. Const. of 1976, art. 2, § 2, ¶ III (1990); Haw. Rev. Stat. § 19-4 (1985); Kan. Stat. Ann. § 21-3901(b) (Supp. 1993); Pa. Const. art. 2, § 7; Mich. Comp. Laws. § 3350 (1929); Miss. Code § 2907 (1993); Mont. Const. art. IV, § 4; N.C. Const. art. VI, § 8; N.H. Rev. Stat. Ann. § 607-A:2 (1955); N.M. Const. art. VII, § 2; Va. Const. art. II, §§ 1, 5. Those states generally disenfranchise convicted felons. See, *e.g.*, Kan. Const. art. V, § 2; Va. Const. art. II, § 1; *Richardson*

campaign contribution reporting and disclosure requirements, or contribution and expenditure limitations. See *Developments in the Law: Elections*, 88 Harv. L. Rev. 1111, 1217, 1223-30 (1975).

Arkansas regulates its electoral process comprehensively. The election code regulates the duties and powers of political parties, including the primary process and use of party loyalty oaths, 6A Ark. Code Ann. §§ 7-3-101 to 7-3-108 (Michie 1993); it establishes the composition, powers and responsibilities of state and county boards of election commissioners, *id.* §§ 7-4-101 to 108, 7-4-201 to 211, and 7-5-101; and it governs every aspect of the electoral process, such as voting qualifications; voter registration; the time and conduct of primaries, as well as general and special elections; the use and form of secret, write-in, and absentee ballots and voting machines; the calculation of election returns; and the circumstances requiring a runoff, *e.g.*, Ark Const. Amend. 50, §§ 1-4; *id.* Amend. 51, §§ 1-20; 6A Ark. Code Ann. tit. 7, ch. 5-8 (Michie 1993). And Arkansas election law defines various felonies and misdemeanors, such as casting more than one vote per election or using public facilities for campaign purposes, that disqualify a person from holding state office. *Id.* §§ 7-1-103 and 7-1-104.

2. *States also have the power to regulate federal elections*

The Constitution established "a system of dual sovereignty between the States and the Federal Government." *Gregory*, 111 S. Ct. at 2399. The process of electing federal officers reflects that division. Although the Constitution created the House of Representatives, the Sen-

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v. *Ramirez*, 418 U.S. 24 (1974) (upholding Cal. Const. art. II, § 2 (1976), as amended, Cal. Const. art. 2, § 4, which disenfranchises ex-felons). Numerous states also have so-called resign-to-run laws, which require a state officeholder to resign that position in order to run for another state or a federal office. *E.g.*, *Clements* v. *Fashing*, 457 U.S. 957 (1982) (upholding Texas resign-to-run law).

ate, and the Presidency, it "submitted the regulation of elections for the federal government, in the first instance, to the local administrations." *The Federalist* No. 59, at 362-63 (A. Hamilton) (C. Rossiter ed. 1961). We have local elections for national office. Representatives are chosen by electors in each State qualified to vote for the most numerous branch of the state legislature. Art. I, § 2, Cl. 2. Senators originally were chosen by the legislature of each State, Art. I, § 3, Cl. 1, now by citizens, Amend. XVII. And the President is chosen by the Electoral College, whose members are appointed by state legislatures. Art. II, § 1, Cl. 1-2; Amend. XII.

Other sections of the Constitution expressly authorize the States to regulate federal elections or implicitly recognize that States have that power, just as they have inherent power to regulate elections for state officers, see *Burdick* v. *Takushi*, 112 S. Ct. 2059, 2063-64 (1992); *Gregory*, 111 S. Ct. at 2400-03; cf. *Coyle* v. *Smith*, 221 U.S. 559 (1911).[6] For instance, the Electors Clause, Art. I, § 2, Cl. 1, rests on the premise that the States can set voting qualifications, since it ties voting qualifications for the House of Representatives to whatever qualifications a State uses for the most numerous branch of its own legislature. This Court also has made clear that, although the Constitution forbids a State from denying a citizen the right to vote due to race, sex, age, or other arbitrary bases, Amends. XIV, XV, XIX, and XXVI,[7] a State has the power under Art. I, § 2, Cl. 1, to define voting qualifica-

[6] See also *The Federalist* No. 4, at 292-93 (J. Madison) (C. Rossiter ed. 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); James Wilson's Speech at a Public Meeting (Oct. 6, 1787), *reprinted in* 1 *The Debate on the Constitution* 64 (Bernard Bailyn ed. 1993) (hereinafter *Debate*) ("every thing which is not given, is reserved").

[7] See, *e.g.*, *Guinn* v. *United States*, 238 U.S. 347 (1915); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Quinn* v. *Millsap*, 491 U.S. 95 (1989).

tions.[8] Moreover, the Elections Clause of the Constitution, Art. I, § 4, Cl. 1, authorizes state legislatures to define the "Times, Places, and Manner" of electing Representatives and Senators. That provision ensures that "[t]he members and officers of the State governments * * * will have an essential agency in giving effect to the federal Constitution." *The Federalist* No. 44, at 287 (J. Madison); see *Carroll* v. *Becker*, 285 U.S. 380 (1932); *Koenig* v. *Flynn*, 285 U.S. 375 (1932); *Smiley* v. *Holm*, 285 U.S. 355 (1932); *Hawke* v. *Smith* (*No. 1*), 253 U.S. 221 (1920).

The power granted States by the Elections Clause includes more than the ability to select the location of polling booths or to tally votes. It is a "comprehensive" delegation of power "to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns[.]" *Smiley* v. *Holm*, 285 U.S. at 366; *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 217 (1986); *Roudebush* v. *Hartke*, 405 U.S. 15, 24 (1972). This Court has held consistently that States have power under that Clause to regulate federal elections in order to protect, for example, the integrity of the process and prevent voter confusion. See, *e.g.*, *Burdick*, 112 S. Ct. at 2063-67.[9]

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[8] See, *e.g.*, *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1874); *The Ku-Klux Cases (Ex parte Yarbrough)*, 110 U.S. 651, 663 (1884); *Davis* v. *Beason*, 133 U.S. 333, 346-47 (1890); *McPherson* v. *Blacker*, 146 U.S. 1, 38-39 (1892); *Williams* v. *Mississippi*, 170 U.S. 213, 222-25 (1898); *Mason* v. *Missouri*, 179 U.S. 328, 335 (1900); *Pope* v. *Williams*, 193 U.S. 621, 632 (1904); *Breedlove* v. *Suttles*, 302 U.S. 277, 283 (1937); *Lassiter* v. *Northhampton County Bd. of Elections*, 360 U.S. 45, 50-51 (1959); cf. *Murphy* v. *Ramsey*, 114 U.S. 15, 43-45 (1885) (Congress has the same power in the territories).

[9] See also, *e.g.*, *Burson* v. *Freeman*, 112 S. Ct. 1846, 1852 (1992); *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 660

States historically have exercised that power. From before 1787 until today, States have overseen federal elections. As this Court explained in *Storer*, "States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." 415 U.S. at 730.

States exercised their Elections Clause power shortly after the Constitution became law.[10] Some imposed additional qualifications on members of Congress atop those listed in the Qualifications Clauses. Virginia added property and residency requirements.[11] Georgia, Maryland,

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(1990); *Tashjian*, 479 U.S. at 217; *Eu* v. *San Francisco Democratic Comm'n*, 489 U.S. 214, 231 (1989); *Storer* v. *Brown*, 415 U.S. at 728-37; *Bullock* v. *Carter*, 405 U.S. 134, 143, 145 (1972); *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971); *Oregon* v. *Mitchell*, 400 U.S. 112, 288 (1970) (opinion of Stewart, J.).

[10] The debates over Art. I, § 4, Cl. 1, reveal that the States thought that they retained significant control over selection of candidates. The debate in the North Carolina ratifying convention, for example, underscores the fear that Congress would exercise its Section 4 power to override state election laws. 2 *Debate* 854-60. Several states, including Massachusetts, New Hampshire, Maryland, and North Carolina, proposed amendments limiting Congress's power to override state election laws. 2 *id.* 548, 551, 554, 573. Proponents of the Constitution assured those who objected to Section 4 that Congress would not deprive States of control absent insurrection or failure to send a representative to Congress. 1 *id.* 428-29; 2 *id.* 751. Ironically, one detractor believed that Congress would pass laws enabling them to "hold their seats as long as they live, and there is no authority to dispossess them." 2 *id.* 813.

[11] Va. Act of Nov. 20, 1788, ch. 2, § II. Virginia's eligibility requirements for congressional candidates certainly were not unknown to the Framers. In the election of 1789, James Madison defeated James Monroe in one of Virginia's ten congressional districts. There is no indication that Madison objected to Virginia's presumed authority to impose its own restrictions on candidates for Congress.

Massachusetts, and North Carolina required a Representative to reside in his district.[12] New Jersey adopted a nominating process as a prerequisite for office.[13] Pennsylvania imposed a rotation requirement on its delegates to Congress in the first federal elections, held in 1788.[14] Furthermore, States were free to elect representatives on either a statewide or district basis until 1842, when Congress, first exercising its Elections Clause power, required House elections to be held by district, not at-large. 5 Stat. 491 (codified at 2 U.S.C. § 2(c) (1988)); *The Ku-Klux Cases (Ex parte Yarbrough)*, 110 U.S. 651, 660-61 (1884).[15] Those restrictions were consistent with

[12] Ga. Act of Jan. 23, 1789, p. 247; Md. Act of Dec. 22, 1788, ch. 10 § VII; Mass. Res. of Nov. 19, 1788, ch. 49; N.C. Act of Dec. 16, 1789, ch. 1, § I. Tennessee was admitted to the union in 1796, and it, too, had a district residency requirement. Tenn. Act of Aug. 3, 1796, ch. 1, § 2.

[13] N.J. Act of Nov. 21, 1788, ch. 241, § 3.

[14] Pa. Const. of 1776, § 11, *reprinted in* 5 *Federal and State Constitutions* 3085 (Francis N. Thorpe ed. 1909) (reprinted 1993) (hereinafter *Thorpe*); see also 1 *The Documentary History of the First Federal Elections, 1788-1790* (Gordon DenBoer and Merrill Jensen eds. 1984) 229-30 (hereafter Documentary History). Pennsylvania deleted that requirement for its elected officials in the 1790 state constitution, but the State believed that its original rotation provision did not violate Article I.

[15] Unlike the Arkansas Supreme Court, the Framers were not troubled by disuniformity in how the States chose Representatives. James Madison believed that the States had the power to elect representatives by district or at-large, and that that freedom was valuable. In an October 1788 letter to Thomas Jefferson written immediately before the first elections to Congress under the new Constitution, Madison commented that some States would elect Representatives at large while others, including Virginia, would create congressional districts. Nothing in Madison's letter even suggests that the Qualifications Clauses controlled the "various modes" adopted by the States for electing candidates to the House. Madison told Jefferson: "A law has passed [in Pennsylvania] providing for the election of members for the House of Representatives and of Electors of the President. The act proposes that every citizen throughout the state shall vote for the whole number of members allotted to the state. This mode of election will confine the choice to characters of general notoriety, and so far be favorable to merit. It is however liable to some popular objections urged

Thomas Jefferson's belief that the States retained power to establish additional qualifications. Jefferson wrote that Article I imposed "some" disqualifications, "[b]ut it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these or any other disqualifications which its particular circumstances call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the States." 2 *The Founders' Constitution* 81 (Philip Kurland & Ralph Lerner eds. 1987) (quoting 11 *The Works of Thomas Jefferson* 380 (P. Ford ed. 1905)).[16]

The States have carried forward such regulations to the present. Some states require that candidates for Congress

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against the tendency of the new system. In Virginia, I am inclined to think the state will be divided into as many districts as there are to be members. In other states, as in Connecticut, the Pennsylvania example will probably be followed; and in others again a middle course be taken * * *. *It is perhaps to be desired that various modes should be tried, as by that means only the best mode can be ascertained.*" 1 *Documentary History* 303 (emphasis added).

After passage of the 1842 law, four States—Georgia, Mississippi, Missouri, and New Hampshire—still elected Representatives on an at-large basis. The 28th Congress seated the delegates, nonetheless, even though their States had willfully violated the 1842 law. Chester H. Rowell, *A Historical and Legal Digest of All the Contested Election Cases in the House of Representatives of the United States, 1789-1901*, at 117-20 (1901).

[16] State legislatures exercised direct control over Senators by electing them, and indirect control through the historic process of "instruction," *viz.*, informing them how to vote on issues. Instruction served as a mechanism by which the state legislatures informed their Senators (and to some, like John Randolph of Virginia, Repsentatives too) how to vote on issues. This practice was widespread in the colonial and revolutionary periods. William E. Dodd, *The Principle of Instructing United States Senators*, 1 South Atlantic Q. 326 (Jan.-Oct. 1902); James K. Coyne & John H. Fund, *Cleaning House* 179-80 (1992); 2 George S. Haynes, *The Senate of the United States* 1025-34 (1960); Roy Swanstrom, *The United States Senate 1787-1801*, S. Doc. No. 100-31, 100th Cong., 1st Sess. 159-72 (1988).

qualify as "electors," *i.e.*, voters.[17] Many States require that electors must be state residents (although the length of the residency period varies).[18] States require candidates to submit petitions with a specific number or percent of signatures by local registered voters in order to appear on the ballot.[19] Some States require congressional candidates in primary elections to show allegiance to (or independence from) a political party.[20] Other States prohibit candidates from running in the general election if they have lost in a primary.[21] And many States forbid candidates for Congress from holding state office or seats on state courts or from running for two seats concurrently.[22] According to a compilation prepared by the Fed-

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[17] *E.g.*, Ill. Ann. Stat. Ch. 5, Para. 7-10 (1993); Iowa Code Ann. § 43.18 (West 1991); Mo. Ann. Stat. § 115,349 (1993); N.C. Const. art. VI § 6, R.I. Const. art. 3, § 1. But cf. *Danielson* v. *Fitzsimmons*, 232 Minn. 149, 44 N.W.2d 484 (1950) (convicted felon can qualify for federal office notwithstanding state constitutional provision to the contrary).

[18] *E.g.*, Del. Code Ann. tit. 15, § 4101 (1981); Idaho Code § 34-604 (Supp. 1991); Minn. Stat. Ann. § 204B.06(c) (Supp. 1990-1991); N.H. Rev. Stat. Ann. § 655:2 (1986); Va. Code Ann. § 5 (Michie 1985).

[19] *E.g.*, Ala. Code § 17-7-1(a)(3) (Supp. 1993); Cal. Elec. Code §§ 6831 & 6838 (West Supp. 1993); Fla. Stat. Ann. § 99.096 (1982); Iowa Code Ann. § 43.20 (West Supp. 1992); Ky. Rev. Stat. Ann. § 118.315(2) (1993); N.Y. Elec. Law § 6-142 (McKinney Supp. 1993).

[20] *E.g.*, Colo. Rev. Stat. § 1-4-601(4) (Supp. 1993); Del. Code Ann. tit. 15, § 3002(b) (Supp. 1990); Haw. Rev. Stat. § 12-3 (Supp. 1991); Iowa Code Ann. §§ 43.18 & 49.39 (West 1991); Mich. Comp. Laws Ann. § 6.1692-1693 (1993); N.C. Gen. Stat. § 163-106 (1991).

[21] *E.g.*, 6A Ark. Code Ann. § 7-7-103(f) (Michie Supp. 1993); Colo. Rev. Stat. § 1-4-105 (Supp. 1993); Ill. Stat., ch. 10, § 5/10-2 (1993); Kan. Stat. Ann. §§ 25-205, 25-202(c) (Supp. 1992); Md. Code Ann. Elec. § 8-2 (Supp. 1991); Neb. Rev. Stat. § 32-516 (1993); N.H. Rev. Stat. Ann. § 659:91-a (Supp. 1992); N.D. Cent. Code § 16.1-13-06 (1992); S.C. Code Ann. § 7-11-210 (Supp. 1992); Tenn. Code § 2-5-101(f) (1993).

[22] *E.g.*, Alaska Const. art. IV, § 14; Ariz. Rev. Stat. Ann. § 38-296(A) (Supp. 1990-1991); La. Rev. Stat. Ann. tit. 18, § 458A (Supp. 1993); Me. Rev. Stat. Ann. tit. 21-A, § 351 (1993).

eral Election Commission, state laws governing congressional elections "are enormously complex. They vary, for example, by state, by type of election, by type of federal office, by type of party or candidate, and by type of criteria and procedure." [23]

Arkansas also regulates the election of its delegation to Congress. State law defines the boundaries of congressional districts, and redistricting is done, in the first instance, by the state legislature. 6A Ark. Code Ann. §§ 7-1-101 to 7-2-105 (Michie 1993). Candidates for Congress must possess the qualifications of registered voters as defined by state law, which means that felons and the mentally incompetent cannot run for federal office. Ark. Const. Art. 19, § 3; *id.* Amend. 51, § 11(4). Anyone defeated in a party primary cannot run as an independent candidate at the general election. 6A Ark. Code Ann. § 7-7-103(f) (Michie 1993).[24] No one appointed

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[23] 2 Federal Election Comm'n, *Ballot Access: For Congressional Candidates* (1988); see also *Senate Election Law Guidebook* 1992, S. Doc. No. 15, 102d Cong., 2d Sess. (1992). Moreover, no one suggests that redistricting and reapportionment by states, for example, violates the Qualifications Clauses, yet this is a broad power through which states determine the selection of their representatives.

[24] There are two methods for a candidate to have his or her name printed on the ballot in Arkansas: by party nomination or as an independent candidate. A candidate seeking party nomination for Congress must pay the filing fee; retain a receipt for fee paid; and at party headquarters complete an affidavit of eligibility, a party loyalty pledge (if one is required), and any necessary party requirements. The state party then issues an acknowledgement that the candidate has completed all party requirements. A congressional candidate also must file various Federal Election Commission forms. 6A Ark. Code Ann. § 7-7-301 (Michie 1993). The candidate must file a receipt, the state party acknowledgement, and a political practice pledge with the Secretary of State. *Id.* § 7-7-301(c) and § 7-6-102(a)(1). For an independent candidate to have his or her name printed on the ballot for United States Senator, the candidate must file petitions signed by not less than 3% of the qualified state electors or containing 10,000 signatures, whichever is less. For a House race, an independent candidate must file petitions signed by not less than 3% of the qualified electors in the congressional district, or with no more than 2,000 signatures. Each elector signing the

by the Governor to fill a Senate vacancy is eligible to succeed himself; spouses and relatives within the fourth degree of consanguinity or affinity to the Governor also cannot be appointed to fill Senate vacancies. Ark. Const. Amend. 29, § 2 (1983). Those laws regulate the procedure and substance of federal elections.[25]

B. Term Limits And Ballot Access Restrictions Are Reasonable Regulations Of The Electoral Process

1. The Founding Fathers envisioned that elected officials would serve in the image of the Roman hero Cincinnatus, who left his plow to raise an army, defended Rome, and once again became a common citizen. The Framers envisioned Congress as consisting of "citizen legislators," in Roger Sherman's words, who would "return home and mix with the people," rather than remaining in office perpetually. James K. Coyne & John H. Fund, *Cleaning House* 112 (1992). Indeed, the members of the Constitu-

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petition must be a registered voter. The petitions can be circulated for signatures not earlier than 60 days before the deadline for filing petitions to qualify as an independent candidate (the date of the deadline for filing political practices pledges and party pledges, or May 1, whichever is later). Anyone defeated in a party primary cannot run as an independent candidate in the general election for the office for which he or she was defeated in the primary. The signature petitions are verified by the Secretary of State's office and if there is a sufficient number of qualified signatures, the Secretary of State will certify the independent candidate's name to be printed on the ballot. *Id.* § 7-7-103(c).

[25] The ruling below could prevent Arkansas from enforcing those other laws. In fact, a lawsuit seeking such relief already has been filed in state court. *Hamilton* v. *McCuen*, No. 94-1475 (Pulaski Cnty. Chancery Ct. filed Mar. 11, 1994). That argument—that a myriad of state election laws are called into question by the Arkansas Supreme Court's ruling—was foreshadowed more than 100 years ago in Congress. In a 19th century contested election in Congress, the case of *Woods* v. *Peters*, Representative Bennett authored a minority report of the House Committee on Elections which catalogued the then-known state election laws that would be called into question if the Qualifications Clauses were deemed exclusive. William H. Mobley, *Digest of Contested Election Cases Arising in the Forty-Eighth, Forty-Ninth, and Fiftieth Congresses* 88-99 (1889) (Report of Mr. Bennett); App. C, *infra*.

tional Convention selected two-year terms for Representatives in order to allow them ample time to master the duties of their offices, yet prevent them from losing what James Madison called "an intimate sympathy with the people." *The Federalist* No. 52, at 327.

During the 18th and 19th centuries, voluntary rotation of office was a common tradition. Officials ordinarily served no more than two terms in the House and one in the Senate; during the Civil War era, less than 2% of Representatives served for more than 12 years. One-third of incumbents would not seek re-election, and turnover in an average election was 40-50% of Congress. American Enterprise Inst., *Limiting Presidential and Congressional Terms* 8 (1979) (*AEI*); James K. Coyne & John H. Fund, *supra*, at 88, 112-13; Mark P. Petracca, *The Poison of Professional Politics*, Policy Analysis, No. 151, at 4 (Cato Inst. May 10, 1991); Sula P. Richardson, *Congressional Tenure: A Review of Efforts to Limit House and Senate Service* 4-5 (CRS Report Sept. 13, 1989).

This century has witnessed a dramatic surge in the number of long-term incumbents. Over the past 60 years, no fewer than 79% of incumbent Representatives seeking reelection have been successful. In only two of those elections, 1938 and 1948, was the incumbents' re-election rate below 80%. In the past three congressional elections, 98%, 96%, and 88% of the incumbents in the House of Representatives who sought re-election won. Moreover, at least 90% of all incumbents seeking re-election were retained in every congressional election from 1974 to 1990.[26] As the result, over time the number of members

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[26] See, *e.g.*, James K. Coyne & John H. Fund, *supra*, at 46; George F. Will, *Restoration* 77 (1992); Robert C. DeCarli, Note, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 Tex. L. Rev. 865, 866 n.7 (1993); Troy A. Eid & Jim Koble, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Denv. U. L. Rev. 1, 3 (1992). 93% of Representatives with 20 or more years of service and 95% of those with 30 or more years of service were elected after 1900. Sula P. Richardson, *supra*, at 5 n.14.

spending 12 or more years in the House of Representatives has jumped from less than 20 at the turn of the century to nearly 200 today, and nearly half of the Senators now remain in office for 12 or more years.[27] See App. I, *infra*. In fact, some observers have concluded that, as a practical matter, incumbents are likely to be unseated only by re-apportionment or scandal.[28]

Arkansas typifies that scenario. Not until 1878, 40 years after statehood, did an Arkansas Representative serve more than three terms. Before the Civil War, 41% of incumbent Representatives did not seek re-election. By contrast, from 1944 to 1966 Arkansas had the same four Representatives. From 1967 to 1992, only 15% of House incumbents did not seek re-election, and during that period 88% of all incumbents seeking re-election were returned to office. From 1942 to 1974, Arkansas had the same two senators. Since the direct election of Senators began, incumbents have won 20 of 22 primaries (91%); no incumbent has ever lost a general election; and in four of 22 races incumbents ran unopposed in the primary and general elections.[29]

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[27] George F. Will, *supra*, at 73-89. Commentators have also criticized related developments: Legislative staffs grew from 4,000 to 37,000 in the last 30 years, and have increased fourfold between 1960 and 1980. In April 1991, there were 37,388 staff in Congress. The number of registered lobbyists doubled between 1975 and 1985. In 1976, there were 1,146 registered political action committees that contributed $22.6 million to House and Senate candidates; a decade later there were 4,211 registered PACs that contributed $139.4 million to House and Senate candidates. James K. Coyne, *Term Limitation: Bringing Change, Competition, Control and Challengers to Congress* 3 (Apr. 19, 1991); Mark P. Petracca, *supra*, at 3. Virtually all PAC contributions go to incumbents. Illustrative charts are in App. I, *infra*.

[28] Sula P. Richardson, *Congressional Tenure: A Review of Efforts to Limit House and Senate Service* 4-5 (CRS Report Sept. 13, 1989); see James K. Coyne & John H. Fund, *supra*, at 117.

[29] The above Arkansas statistics can be found in the records of the Office of the Arkansas Secretary of State and in *Biographical Directory of the United States Congress, 1774-1989* (U.S. Gov't Printing Office 1989).

The upshot is this: The Framers' ideal of "citizen-legislators"—individuals temporarily serving the nation in government before returning to private life—has been eclipsed by the cynical (and corrosive) belief that elected officials often are simply entrenched career politicians more interested in permanently maintaining their sinecures than in representing the people. To remedy that problem, numerous States already have adopted or are considering resuse of an historical electoral practice to enhance rotation in office.

2. Term limits have an ancient pedigree.[30] Term limits were widespread during the colonial and revolutionary periods. For example, the Constitution of Virginia of 1776 expressly endorsed rotation as a valuable principle.[31] The Pennsylvania Constitution of 1776 set a four-year limit on the legislature. Ten of the 13 new States imposed term limits upon their state executives, legislators, or delegates to Congress. App. B, *infra*. The Articles of Confederation established a unicameral legislature with delegates appointed annually by state legislatures. Arts. of Confederation Art. V. The delegates to the First and Second Continental Congresses were chosen without any term of office; they could serve only three years in a six-year period; and they could be recalled at any time. The limitation sought to prevent officeholders from becoming "a perpetual 'ruling class' of legislators who might thus

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[30] The principle that term limits promote valuable rotation in office traces its lineage to Athens and Rome. James K. Coyne & John H. Fund, *supra*, at 110.

[31] Section 5 provided that "the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct." Va. Const. of 1776, pt. 1, § 5, *reprinted in* 7 Thorpe 3812, 3813.

become unresponsive to their constituents' needs." Sula P. Richardson, *supra*, at 2; Charles O. Jones, *Every Second Year* 2-3 (1967); James K. Coyne & John H. Fund, *supra*, at 111.

The Virginia Plan for a new Constitution, drafted by James Madison and introduced by Edmund Randolph of Virginia, initially provided that members of the House and Senate would be "incapable of reelection" for an unspecified period of time "after the expiration of their terms of service." 1 *Records of the Federal Convention of 1787*, at 20 (M. Farrand ed. 1987) (hereafter *Farrand*). Nonetheless, the Constitutional Convention of 1787 principally debated the length of terms for the House and Senate, rather than the length of service for individual officeholders. Although there is no recorded debate on the issue, the Committee of the Whole decided against including term limits because they "enter[ed] too much into detail for general propositions." 1 *id.* at 50-51. Some parties criticized the Constitution for not requiring rotation, but supporters defended the absence of term limits on the ground that the specified terms of office and the need for Representatives to be re-elected biennially ensured turnover. See, *e.g.*, 1 *The Debate on the Constitution* 111, 325-26, 367-68, 401-02 (Bernard Bailyn ed. 1993); 2 *id.* 891-93, 902.

Similar mandatory rotation proposals were advanced shortly after the First Congress convened. None, however, became law.[32] Although the principle of rotation in office never lost currency, the idea of imposing legal term limits on Members of Congress fell into desuetude for the

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[32] On August 18, 1789, South Carolina Representative Thomas Tucker introduced proposals to limit service in the House and the Senate. 1 *Annals of Congress* 762 (Joseph Gales ed. 1789). One proposal would have limited a Representative to six successive years in an eight-year period. The other one would have limited a Senator's term to one year, with a cap of five consecutive years of service during a six-year period. The House did not vote on either proposal. Sula P. Richardson, *supra*, at 4.

ensuing 150 years, perhaps due to the precedent set by Washington and Jefferson of serving only two terms as President and the high rates of voluntary legislative rotation seen in that era. Mark P. Petracca, *supra*, at 14; Sula P. Richardson, *supra*, at 4-6.[33]

The same period witnessed a two-fold increase in the average tenure of House service, from four to eight years, as a number of interrelated factors made longer congressional service more attractive. Congress established standing committees. The congressional seniority system, which evolved by internal customs and political party rules, determined which members sat on and chaired committees, thereby enhancing the value of longevity in office. Lengthy tenure replaced expertise as the source of congressional influence. The federal government gradually assumed an increasingly powerful role in setting policy for the nation. Together, those factors eventually helped give rise to career congressmen. Sula P. Richardson, *supra*, at 5. And that development has been characterized as perhaps the most significant event in modern-day politics. See, *e.g.*, George F. Will, *Restoration* (1992).

Recent history shows that officials are unlikely voluntarily to relinquish office unless it is to seek another position. Members of Congress have developed an institutional interest in prolonging their own tenure. Also, it is no answer that voters can select other representatives. The seniority system bestows considerable benefits on senior incumbents, so it is unreasonable to expect individual voters to handicap themselves by turning out their own officials without some expectation that every other group vieing for its share of the public fisc will occupy the same

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[33] Only once has there been a recorded vote in Congress on term limits for the House or Senate. During the debate on the Twenty-Sixth Amendment, which limited the President to two full terms, Senator O'Daniel offered an amendment that would have limited Members of Congress to six years in office. The Senate defeated the amendent 82-1, with only Senator O'Daniel voting in its favor. 93 Cong. Rec. 1962-63 (1947).

position. To be sure, while no State can force another to limit the terms of its officials, each State can ensure that its entire electorate is in the same position and can add to the number of States limiting Members' terms, thereby hoping over time incrementally to encourage Congress to equalize the conditions among the States by proposing a constitutional amendment under Article V or by passing legislation under Article I limiting Members' terms. Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 Yale L.J. 1971 (1994). Accordingly, just as the courts were the only agency in an institutional position to effect a rational constitutional solution to the problem of malapportionment, Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 Yale L.J. 64, 79-80 (1962), so, too, term limits (or ballot access laws) are the only (or at least the most direct) institutional means of effecting a rational solution to the problem of entrenched incumbency.

The resurgent interest in rotation for federal officeholders fits into a settled fabric of state law imposing similar requirements on their state officers. Twenty States limit the terms of the governor or other executive officials. App. D, *infra*. Fourteen additional States (including Arkansas) impose term limits on the governor (and other executive officials) and legislators. Apps. E-F, *infra*. Only 12 States do not limit the terms or ballot access of officeholders in some manner. App. G, *infra*. Finally, more than 200 municipalities have term limits or incumbency-based ballot access restrictions for local officials. App. H, *infra*.

The States have not limited such reforms to their own offices. To remedy actual and perceived ills resulting from contemporary incumbency rates, Arkansas and 14 other States have established term limits or ballot access restrictions for federal elective office.[34] As a result, 153 Repre-

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[34] See Ariz. Const. art. VII, § 18; Cal. Elec. Code § 25003 (Deering 1993); Colo. Const. art. XVIII, § 9a; Fla. Const. art. 6, § 4; Mich.

sentatives and 28 Senators are today subject to such laws, and other States are considering whether to adopt such measures. Present indications are that term limits and ballot access initiatives may appear on the ballot in a number of States this or next year.[35]

Historic figures in American politics have endorsed the principle that frequent turnover of elected officials is a healthy feature of a vibrant democratic republic. John Adams, delegate to the Constitutional Convention, believed that rotation would "teach" men "the great political virtues of humility, patience, and moderation without which every man in power becomes a ravenous beast of prey." George F. Will, *supra*, at 110. Elbridge Gerry thought that " '[r]otation keeps the mind of man in equilibria [*sic*] and teaches him the feelings of the governed' and counters 'the overbearing insolence of office.' " *Id.* George Mason and Andrew Jackson believed in the value of rotation. Thomas Jefferson was critical of the fact that the Constitution did not limit congressional terms.[36] Presidents Abraham Lincoln, Harry Truman, Dwight Eisenhower, John Kennedy, and George Bush favored term limits. James K.

Const. art. II, § 10; Mo. Const. art. III § 45(a); Mont. Const. art. IV, 8; N.D. Cent. Code § 16.1-01-13.1 (1992); Ohio Const. art. V, § 8; Ore. Const. art. II, § 20; S.D. Const. art. III, § 32; Wash. Rev. Code § 29.68.015-.016 (West 1992); Wyo. Stat. § 22-5-104 (1992). The Nebraska law, Neb. Const. art. XV, § 20, was recently held invalid on state law grounds due to a defect in the initiative process. *Duggan* v. *Beermann*, 515 N.W.2d 788 (Neb. 1994). A district court held the Washington law unconstitutional on February 10, 1994. *Thorsted* v. *Gregoire*, 841 F. Supp. 1068 (W. D. Wash. 1994), appeals pending *sub nom. Thorsted* v. *Munro*, Nos. 94-35222 et al. (9th Cir.).

[35] A NEXIS search indicated that the following states are considering new or additional term limits proposals: Alaska, Idaho, Illinois, Massachusetts, Maine, Nebraska, Oklahoma, Nevada, and Utah.

[36] Jefferson wrote Madison that "[t]he second feature I dislike, and greatly dislike, is the abandonment in every instance, of the necessity of rotation in office. . . ." Thomas Jefferson, Letter from Jefferson to Madison (Dec. 20, 1787), *reprinted in* 1 *Debate* 211.

Coyne & John H. Fund, *supra,* at 113, 159-64; James C. Otteson, 41 DePaul L. Rev. at 22-23; Mark P. Petracca, *supra,* at 21; Sula P. Richardson, *supra,* at 8-9.

3. Term limits further democratic principles in several ways: Their principal purpose is to help offset what are often described as the nearly insurmountable advantages of incumbency. Incumbents typically raise more funds than challengers, and incumbents can carry over unspent campaign funds from one election to the next. Incumbents have use of the franking privilege to distribute mass mailings, easier access to media coverage, as well as greater name recognition and visibility, particularly given the use of televised hearings and floor speeches. A member's televised hearings or floor speeches ideally provide already-produced television sound bites, while challengers must expend considerable sums for comparable ads. Long-term incumbents enjoy seniority, which enables them to bestow favors on constituents or local interest groups at public expense. Term limits are designed to "even out the playing field" and promote frequent rotation of elected officials in order to ensure that they are representative of, and responsive to, the public. See, *e.g.*, George F. Will, *supra,* at 146-212; Mark P. Petracca, *supra,* at 15-20; James K. Coyne & John H. Fund, *supra,* at 113; Sula P. Richardson, *supra,* at 11-12; *Buckley* v. *Valeo,* 424 U.S. 1, 31 n.33 (1976); App. I, *infra.*

But term limits have been adopted for other reasons, too. Advocates of term limits believe that, by increasing turnover, term limits will increase the racial, gender, and career diversity of Members of Congress; that, by promoting a continuous influx of new Members, term limits will induce citizens to run for political office without committing themselves to a political career; that, by eliminating the possibility of becoming a career legislator, term limits will prompt Members to exercise their independent judgment in the public interest and reduce the time spent on fundraising, self-promotion, and "pork barrel" legislation; that, by preventing congressmen from developing

long-term relationships with the permanent bureaucracy, term limits will enhance skepticism and oversight of administrative programs; that, by substantially increasing the number of competitive congressional races, term limits are likely to increase voting rates; that, by "breaking up the 'ruling class' mentality that accompanies lifetime tenure in office," term limits more directly and precisely focus on problems of modern government than, say, spending limits or public campaign financing; that, by forcing political parties to seek new candidates, term limits will invigorate the role of political parties, rather than individual politicians; and that over time term limits will help purge the cynicism toward Congress plaguing today's electorate. In sum, as a remedy for the "depressing combination of legislative insularity, voter apathy, and special interest influence," Linda Cohen & Matthew Spitzer, *Term Limits*, 80 Geo. L.J. 477, 479 (1992) (footnote omitted), term limits are seen by the States that have adopted them as a necessary medicament to restore a healthy democracy. See, *e.g.*, Ark. Const. Amend. 73 Preamble, *quoted at* pp. 3, 4a; George F. Will, *supra*, at 176-83, 212; *AEI* 21-22; James K. Coyne & John H. Fund, *supra*, at 117-40; James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 DePaul L. Rev. 1, 13-18, 26-32 (1991).

II. STATES CAN RESTRICT ACCESS TO THE BALLOT FOR THE OFFICES OF REPRESENTATIVE AND SENATOR

A. States Have The Authority Under The Elections Clause And The Tenth Amendment To Impose Ballot Access Restrictions For The Offices Of Representative And Senator

The Constitution expressly provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Art I, § 4, Cl. 1. This Court often has upheld the States' exercise of that authority as long as they do not rely on an arbitrary factor, effectively confer a monopoly on the two major

parties, or freeze the political status quo. See, *e.g.*, *Burdick*, 112 S. Ct. at 2063-68. As a practical matter if elections are to be orderly, fair, and honest, rather than chaotic and biased, some regulation is essential. *Id.*

Every electoral regulation invariably imposes some burden on voters and candidates. Filing deadlines, party nomination or petition signature requirements, redistricting, etc., prevent some voters from electing the candidates of their choice in the interest of ensuring that elections are conducted responsibly and efficiently. The Framers evidently were willing to tolerate that effect, however, since they empowered the States to hold federal elections. The Court has recognized a need to accommodate the Elections and Qualifications Clauses, since *Storer* upheld a state regulation of federal elections despite its exclusionary effect. 415 U.S. at 728-37, 746 n.16. The issue, then, is how to distinguish a "regulation" from a "qualification."

The principal distinction between the two terms is that a "qualification," unlike a "regulation," is a prerequisite for (in this case) holding office. Then-contemporary dictionaries used that concept to define a "qualification." [37]

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[37] See, *e.g.*, *American Dictionary of English Language* (1828) ("Any natural endowment or any acquirement which fits a person for a place, office or employment * * *; Legal power or requisite; as the *qualifications* of electors"); *Oxford English Dictionary* (1971) (definition from 1669) ("A quality, accomplishment, etc., which qualifies or fits a person *for* some office or function. * * * * * A necessary condition, imposed by law or custom, which must be fulfilled or complied with before a certain right can be acquired or exercised, an office held, or the like"); John Ash, *The New and Complete Dictionary of the English Language* (1775) ("An accomplishment, that which makes fit; that which puts a man under the protection of the law in any office or profession"); Rev. John Davis, *Walker's Critical Pronouncing Dictionary and Expositor of the English Language* 442 (1828) ("That which makes any person or thing fit for any thing * * *"); Rev. Thomas Dyche, *A New General English Dictionary* (1777) ("something that enables or empowers a person to do that which otherwise he could not"); Samuel Johnson, *A Dictionary of the English Language* (1768) ("That which makes an person or thing fit for any thing"); William

Blackstone understood that "qualifications of persons to be elected members of the house of commons" meant criteria that entitle someone to hold that office. 1 W. Blackstone, *Commentaries*, reprinted in 2 *The Founders' Constitution* 68-69; see also 1 Joseph Story, *Commentaries on the Constitution* §§ 612-15 (1883), *reprinted in* 2 *The Founders' Constitution* 81-82. That interpretation is also the one that the Framers must have had in mind when drafting the Electors Clause, since the States had prerequisites to vote, such as freehold requirements. Construing the term "qualification" as a "prerequisite" is consistent with the use of that term in Art. I, § 5, Cl. 1, which authorizes each Chamber to "be the Judge of the Elections, Returns, and Qualifications of its Own Members"; each House can judge whether someone has satisfied the prerequisites for office. Finally, defining a "qualification" as a prerequisite for office leaves that term judicially manageable, whereas defining that concept by reference to some degree of difficulty does not. In sum, interpreting the term "qualification" as referring to a "prerequisite for holding office" is not only a sensible construction of that term, but also ensures that it has the same meaning throughout Article I.

So viewed, the term "qualification" does not embrace ballot access laws, like Amendment 73, that allow a candidate to be elected by a write-in vote. Such laws regulate only the manner by which votes are cast to obtain a majority, rather than the conditions that a person must satisfy to be sworn into office if that person garners a majority. Moreover, ballot access laws leave nothing for either Chamber to judge, since they regulate only the process of casting votes, instead of the attributes that candidates must possess to become elected officials.

Perry, *A General Dictionary of the English Language* (1795) ("an accomplishment; capacity, fitness"); Thomas Sheridan, *A General Dictionary of the English Langage* (1784) ("that which makes an person or thing fit for any thing"); see also 2 John Bouvier, *Law Dictionary* 408 (1864) ("Having the requisite qualities for a thing; as, to be president of the United States, the candidate must possess certain qualifications.").

The Court's decision in *Storer* v. *Brown*, decided five years after *Powell*, supports the conclusion that ballot access laws like Amendment 73 do not violate the Qualifications Clauses. In *Storer*, the Court upheld a state law disqualifying from the ballot as an independent candidate for the House anyone who voted in the preceding primary or had been registered in a political party within one year prior to that primary. 415 U.S. at 728-37. Ineligible candidates challenged the law on the ground that their exclusion from the ballot was tantamount to imposition of an additional qualification for federal office, in violation of the Qualifications Clause. *Id.* at 727. In upholding the California law, the Court expressly rejected the candidates' Qualifications Clause challenge to the statute, holding that it no more imposed a "qualification" on federal office than a state law requiring a candidate, in order to garner a place on the ballot, to win a party primary or otherwise to establish substantial community support. *Id.* at 746 n.16. In fact, *Storer* found the argument "wholly without merit." *Id.* *Storer* thus establishes that a state law regulating a candidatè's access to the ballot is not necessarily unconstitutional under the Qualifications Clauses, even if it has an exclusionary effect.

Consistent with *Storer*, three federal courts of appeals have held that a state law imposes a "qualification" for Article I purposes only if it necessarily excludes from office a person who captures the majority vote at the ballot box. The First Circuit in *Hopfmann* v. *Connolly* held that a law does not impose a "qualification" for office for purposes of Article I unless that law renders a candidate ineligible to hold office if he or she garners a majority of the votes cast in an election. 746 F.2d at 102-03. The law at issue provided that only candidates receiving 15% of the vote on a ballot at the convention could challenge the convention's endorsement in a state primary election. The court of appeals sustained that provision against a challenge based on the Qualifications Clauses. As the First Circuit explained, "the test to determine whether or not the 'restriction' amounts to a 'qualification' within the

meaning of Article I, Section 3, is whether the candidate 'could be elected if his name were written in by a sufficient number of electors.'" *Id.* at 103 (quoting *State* v. *Crane*, 197 P.2d 864, 871 (Wy. 1948)). The Ninth and Eleventh Circuits have followed that approach as well. See *Joyner* v. *Mofford*, 706 F.2d at 1531; *Public Citizen* v. *Miller*, 813 F. Supp. 821 (N.D. Ga.), aff'd on the basis of the district court opinion, 992 F.2d 1548 (11th Cir. 1993); see also *State ex rel. O'Sullivan* v. *Swanson*, 257 N.W. 255, 255-56 (Neb. 1934); *State ex rel. McCarthy* v. *Moore*, 92 N.W. 4 (Minn. 1902).

Under the foregoing decisions, ballot access measures, like Amendment 73, are a clear example of a lawful exercise of the States' Elections Clause power to regulate the "Manner" of federal elections. That Clause vests in the States the right to decide how votes are cast: by levers in booths, by punch cards, by coupons, or by whatever devices new technologies produce. James Madison made that specific point at the Convention. 2 *Farrand* 240-41. Arkansas could lawfully decide, for instance, that all ballots will be cast as write-in ballots, whether for incumbents or challengers, since a candidate has no right under the Constitution to have his or her name appear on a printed ballot. Indeed, such a claim would have been alien to the Framers. During their era, electors typically voted by voice vote, by a show of hands, by handwritten ballot, or by using an item, such as an ear of corn, to signify their choice. Ark. Const. of 1836, § 8 ("[a]ll general elections shall be viva voce until otherwise directed by law"); John L. Ferguson & J.H. Atkinson, *Historic Arkansas* 67 (1966); L.E. Fredman, *The Australian Ballot: The Story of An American Reform* 20-21 (1968); 1 Charles Seymour & Donald Paige Frary, *How the World Votes* 217-20, 246-48 (1918); *e.g.*, Albert Edward McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* 22, 101-02, 111 (1905). Until the late 1800s, all ballots cast in this country were write-in ballots; the system of state-prepared ballots was introduced no earlier than 1888. Prior to

that time, voters composed their own ballots or used preprinted tickets prepared by political parties. L.E. Fredman, *supra*, at ix, 7-9, 20-21; 1 Charles Seymour & Donald Paige Frary, *supra*, at 250-52; *Burdick*, 112 S. Ct. at 2070 (Kennedy, J., dissenting); *Burson*, 112 S. Ct. at 1852. Since the institution of state-sponsored, preprinted ballots became commonplace, and because States restrict the number of candidates who can be listed on such ballots, it has always been the case that some citizens cannot vote for the candidate of their choice unless they exercise a write-in option. Across-the-board use of the write-in process would be a valid exercise of the States' power to regulate the manner of federal elections. The States' more selective use of that power therefore does not impose a "qualification" on federal office within the meaning of Article I.

Ballot access laws are a reasonable exercise of the States' authority under the Elections Clause. That Clause vests in the States authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at 366. The "fundamental right involved" is the right to be governed by delegates responsible and responsive to the electorate. Entrenched incumbency threatens that right to no less a degree than electoral fraud. According to James Madison, "[t]he genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people by a short duration of their appointments[.] * * * A frequent change of men will result from a frequent return of elections; and a frequent change of measures from a frequent change of men * * *." *The Federalist* No. 37, at 227. The Delegates to the Constitutional Convention believed that the benefits of rotation would be achieved by virtue of the short term served by Representatives. Although for much of our history the Framers estimate proved correct, that is no longer the case. Term limits are a reasonable attempt to achieve

the fundamental values described by Madison and others in light of present-day political realities.

To be sure, Amendment 73 does not require all candidates for federal office to stand for election as write-in candidates; only certain incumbents must seek re-election in that way, and the court below was troubled by that fact. Pet. App. 15a. But the question whether Amendment 73 impermissibly discriminates against incumbents is better viewed as raising an equal protection concern, than as imposing an additional "qualification" on federal elected office. Insofar as Amendment 73 is criticized on the ground that it unfairly excludes long-term incumbents from the ballot and burdens them with the need to run as write-in candidates while permitting the remaining candidates to appear on the ballot, the perceived vice in Amendment 73 lies not in its use of the write-in procedure per se, which itself is lawful, but in the preferential treatment afforded challengers and short-term incumbents, who are exempted from reliance on the write-in process. *That* claim raises a classic equal protection issue, which would be analyzed under the standard articulated in *Burdick* and *Anderson*, since it is the different treatment afforded the two categories of candidates (long-term incumbents vs. everyone else), not the mere use of the write-in mechanism, that would generate concern. The constitutionality of Amendment 73 should be analyzed under traditional equal protection principles, not as adding an "additional qualification" to office, as the court below held.[38]

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[38] This Court and the lower courts have consistently upheld term limit laws over First and Fourteenth Amendment claims, even without a write-in option and even if the ban lasts for a lifetime. See, *e.g.*, *State ex rel. Maloney* v. *McCartney*, 223 S.E.2d 607 (W. Va.), appeal dismissed for want of a substantial federal question, 425 U.S. 946 (1976) (upholding two-term limit for governor); *Miyazawa* v. *City of Cincinnati*, 825 F. Supp. 816, 821 (S.D. Ohio 1993) (upholding term limits for city council members); *Legislature* v. *Eu*, 816 P.2d 1309, 1327-28 (Cal. 1991) (upholding term limits for state legislators because "the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those

B. Amendment 73 Is A Permissible Ballot Access Restriction

As Justice Cracraft explained in dissent below, Pet. App. 37a-39a, the ballot access restrictions imposed by Amendment 73 do not fix a "qualification" for the office of Representative or Senator under the test applied by the First, Ninth, and Eleventh Circuits, since that Amendment does not prevent a candidate who receives the majority of votes cast at the election from holding those offices. The text of the Amendment itself makes that point clear. The Amendment only restricts access to the ballot for congressional candidates, while imposing a strict term limit on state officers.

The Arkansas Supreme Court readily acknowledged that an incumbent could run for the House or Senate as a write-in candidate and that any write-in candidate receiving a majority of the votes cast at a general election would be entitled to hold office. Pet. App. 15a. The

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who would vote for them"), cert. denied, 112 S. Ct. 1292, 1293 (1992); *Maddox* v. *Fortson*, 172 S.E.2d 595, 598-99 (Ga.) (upholding term limits for state offices), cert. denied, 397 U.S. 149 (1970); *Roth* v. *Cuevas*, 158 Misc. 2d 238, 603 N.Y.S.2d 962, aff'd, 624 N.E.2d 689 (N.Y. 1993). Term limits rationally promote legitimate and compelling state interests, like the ones set forth in Amendment 73, *quoted at* pp. 3, 4a. Term limits do not offend the First Amendment since they do not regulate on the basis of political ideology or affiliation, only on the basis of incumbency, which is a politically-neutral criterion. Nor do such term limits trespass on the Fourteenth Amendment. By definition incumbents are not politically powerless and in need of special protection from the majoritarian political process, cf., *e.g.*, *San Antonio Indep. School Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973) (indeed, the theory upon which term limits rests is that the opposite is true); the status of "incumbency" is not an immutable characteristic (at least one would hope), like race, that is entitled to heightened judicial protection, cf., *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 445 (1985); and term limits do not infringe on a fundamental right, since there is no fundamental right to hold office, run as a candidate, or vote for any particular individual, see, *e.g.*, *Burdick*, 112 S. Ct. at 2063-64; *Anderson* v. *Celebrezze*, 460 U.S. 780, 786 (1983); *Clements* v. *Fashing*, 457 U.S. 957 (1982).

procedure to become a write-in candidate in Arkansas is not onerous.[39]

Nonetheless, the court below equated the practical difficulties facing a write-in candidate with a prohibition on holding office, because write-in candidates, according to the court below, have only a "glimmer of opportunity" for success. That fear is misplaced, for two reasons.

To begin with, although it is doubtless the case that ballot access restrictions may make it more difficult for some write-in candidates to win some elections, that is not always true. In fact, a write-in candidate won election to Congress from Arkansas in 1958. *Historical Report of the Arkansas Secretary of State 1986*, at 236 (Steve Faris ed. 1986). The standard applied by the First, Ninth, and Eleventh Circuits does not treat a restriction as a "qualification" unless it prohibits a candidate who is victorious at the polls from holding office *as a matter of law*. Since Amendment 73 does not have that effect, it should not be treated as a "qualification" under Article I. In addition, Arkansas election statistics show that there has been virtually no competition for federal office since World War II. See App. I, *infra*. Without Amendment 73, challengers will continue to have *less* than a "glimmer of opportunity" of success. Amendment 73 does not create a new problem; it remedies an existing one.

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[39] To appear as a write-in candidate for Congress in Arkansas, a candidate (or his agent) must notify the Secretary of State of his intention at least 60 days before the general election. 6A Ark. Code Ann. § 7-5-205 (Michie Supp. 1993). A blank line is then printed on the ballot. *Id.* § 7-7-208(h)(3). Only votes for the candidates who have notified the Secretary of State of their intention to run as a write-in will be counted. *Id.* § 7-5-205. Candidates must file a pledge that they are familiar and will comply with state election law. *Id.* § 7-6-102(a)(1)(4). A candidate must complete a background information form and supply a picture. Hence, there are but two prerequisites to run as a write-in candidate for congressional office—notification of intent to run, and the pledge—neither of which imposes a significant burden. It is more burdensome for a candidate to have his or her name appear on the printed ballot in Arkansas. P. 17 n.24, *supra*.

Amendment 73 compares favorably with the state laws upheld in *Storer* and *Burdick*. *Storer* upheld a state law excluding from the ballot as an independent candidate anyone who lost in the primary or was registered in a political party, while *Burdick* sustained a state law that altogether prohibited write-in votes. Amendment 73 imposes no greater burden on candidates and voters than the laws upheld in those cases, since it allows long-term incumbents to be re-elected through the write-in process.

III. STATES CAN IMPOSE TERM LIMITS ON THE OFFICES OF REPRESENTATIVE AND SENATOR

A. The Qualifications Clauses Do Not Prohibit The States From Imposing Qualifications For The Offices Of Representative And Senator

1. Constitutional analysis, like statutory interpretation, must begin with the text of the relevant law, and "the plain language of the enacted text is the best indicator of intent." *Nixon* v. *United States*, 113 S. Ct. 732, 737 (1993). The Qualifications Clauses provide that "[n]o Person shall be a Representative [or Senator] who shall not have attained to the Age of twenty five Years [or 30], and been seven [or nine] Years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in [or from] which he shall be chosen." Art. I, § 2, Cl. 2, and § 3, Cl. 3. The Clauses do not state that they impose "uniform" or "exclusive" requirements for office. Compare Art. I, § 8, Cl. 1 (requiring "Duties, Imports and Excises" to be "uniform throughout the United States"), Cl. 4 (authorizing Congress to establish "uniform" naturalization and bankruptcy laws), Cl. 17 (authorizing Congress to exercise "exclusive" power over the District of Columbia). The Clauses also are written as a prohibition, *viz.*, as disqualifications from office. In other words, rather than declare that all persons satisfying those qualifications are eligible for congressional office, the Qualifications Clauses are more naturally read to disqualify anyone who fails the three defined criteria. The Clauses define a floor, or minimum qualifications that an

official must possess, thereby allowing States to add additional ones.

The court below read the Qualifications Clauses as being exclusive in order to ensure that they impose uniform requirements nationwide. That approach is mistaken. The Qualifications Clauses also refer to citizenship and inhabitancy, yet, in 1790 those concepts were defined by state law. The definition of citizenship was not uniform throughout the new nation, and there was no constitutional definition of citizenship until the Fourteenth Amendment was ratified in 1868. The definition of inhabitancy depended on state law (and does still), particularly on the issue of what length and type of absence from the State constituted a forfeiture of residency. Accordingly, because the States had the power to define the concepts of citizenship and inhabitancy for purposes of the Qualifications Clauses, it is dubious that the Clauses impose uniformity on the States in every other regard, thereby ousting them of their historic power to set qualifications for elected office. Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97, 117-19 (1991).[40]

Related provisions of the Constitution also show that the Qualifications Clauses do not define exclusive qualifications for Representative and Senator. The Impeachment Clause, Art. I, § 3, Cl. 7, authorizes disqualification from federal office of any person convicted after being impeached. The Incompatibility Clause, Art. I, § 6, Cl. 2, bars anyone from simultaneously holding office

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[40] The first recorded contested election case in Congress, *Ramsey* v. *Smith*, involved the issue whether a member sent from South Carolina qualified as an inhabitant of that State and a citizen of the United States. M. St. Clair Clarke and David A. Hall, *Cases of Contested Elections in Congress* 23-37 (1834) (hereafter "Contested Elections"). In 1789, the Committee of Elections determined that both questions were to be resolved by the law of South Carolina: "I take it to be a clear point, that we are to be guided, in our decision, by the laws and constitution of South Carolina, so far as they can guide us * * *." *Id.* at 32 (speech of Mr. Madison).

in the Legislative and Executive Branches. The Oath or Affirmation Clause, Art. VI, Cl. 3, requires Congressmen to take an oath or to affirm to support the Constitution, while the companion Religious Test Clause prohibits the federal and state governments from imposing a religious test as a qualification for federal office, thereby indicating that such a test otherwise could have been imposed. Finally, Section 3 of the Fourteenth Amendment disqualified anyone who fought on behalf of the Confederacy during the Civil War. Taken together, these provisions show that the Qualifications Clauses do not fix the exclusive prerequisites for Congress and that other relevant sections of the Constitution must be considered. The Elections Clause and Tenth Amendment are such provisions, and they support the constitutionality of ballot access laws, like Amendment 73.

The conclusion that the Qualifications Clause do not bar the States from adding requirements to hold office is supported by the text of Art. I, § 10, Cls. 1-3. Those sections declare that "[n]o State shall" undertake certain actions, such as "enter into any Treaty, Alliance, or Confederation," "coin Money," "grant any Title of Nobility," or enact specific types of laws, such as "any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts." Those clauses show that the Framers knew how to impose an express prohibition on the States but chose not to do so in the Qualifications Clauses. A State's imposition of qualifications on Representatives and Senators thus is consistent with the overall structure of Article I.[41]

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[41] For that reason, we disagree with the conclusion held by Justice Joseph Story, Professor Charles Warren, and Judge Thomas Cooley. 1 Joseph Story, *supra*, § 624, *reprinted in* 2 *The Founders' Constitution* 243; Charles Warren, *The Making of the Constitution* 420-22 & n.1 (1937); Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 331 (1931). They invoke the "expressio unius, exclusio alterius" rule of construction, *viz.*, that by specifying certain prerequisites, the Qualifications Clauses necessarily exclude all others. That rule of construction must give way, however, when there is strong evidence to the contrary, as there is in this case.

The Tenth Amendment is also relevant, because it reserves to "the States" or "the people" all powers not granted to the national government nor prohibited to the States elsewhere in the Constitution. At worst, the text of the Constitution is silent or ambiguous with regard to the question presented by this case. The Constitution does not expressly vest authority in the national government to impose additional qualifications for the House and the Senate, nor does it expressly prohibit the States from doing so. Under these circumstances, the Tenth Amendment offers a valuable interpretive guide, because it instructs the courts to resolve doubts about the legality of laws like Amendment 73 in favor of "reserving" to the States or the people the "power[]" to regulate the electoral process within each State. See generally Amicus Br. of Washington Legal Foundation; Amicus Br. of Nebraska *et al.*

It is no objection to Amendment 73 that its purpose is to limit the tenure of Representatives and Senators. The Qualifications Clauses do not contain an element of intent akin to the one that is applied under the Equal Protection Clause, see *Washington* v. *Davis*, 426 U.S. 229 (1976); *Personnel Adm'r* v. *Feeney*, 442 U.S. 256 (1979), because the two Clauses serve wholly different purposes. Public financing of challengers' campaigns would not be unconstitutional under the Qualifications Clauses even if its purpose was to unseat incumbents, because a law underwriting the cost of a campaign excludes no one from the ballot, let alone from office. Accordingly, while it is true that a purpose and hoped-for effect of Amendment 73 is to increase rotation in office, that intent is immaterial to its constitutionality.

There is no need to read the Qualifications Clauses as exclusive in order to protect the integrity of the federal system. The Constitution preserved the States' power "to determine the qualifications of their most important government officials," *Gregory*, 111 S. Ct. at 2402, since that authority posed no threat to the national government or any other State. A State that sets term limits for its

Representatives and Senators imposes no burden on the federal government's ability to exercise its delegated powers. In addition, since the Constitution reserved to the States the greater power to set voting qualifications for federal officers, it is illogical to conclude that the States' exercise of the lesser power to set qualifications to hold such offices threatens the federal government in some way. In any event, Congress has the power under the Elections Clause to supersede laws enacted by the States, so that the federal government is fully able to impose a uniform rule should it decide to do so. Cf. *Roudebush* v. *Hartke*, 405 U.S. 15 (1972). Also, one State's decision to retire its long-term incumbents forces no other State to pursue that course. Thus, contrary to the Arkansas Supreme Court's belief, there is no need to construe the Qualifications Clauses as mandating uniformity in order to safeguard the interests of the national government or other States.

Interpreting the Constitution as reserving to the States the power to impose additional qualifications for federal office also sensibly allocates power in our federal system. For example, Arkansas and other States deny felons and the mentally incompetent the right to vote for or hold state office and deny felons the right to vote in federal elections. Pp. 9-10 n.5, *supra*. It would be anomalous to rob States of the right to keep those persons from serving in Congress. If States cannot set qualifications for their congressmen, they would have no power over their characteristics, even though States have the power to select characteristics for the electorate. Here, too, the greater power reasonably includes the lesser.[42]

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[42] Justice Story said that States did not reserve the right under the Tenth Amendment to set additional qualifications for the House and Senate, since those offices did not exist until the Constitution created them. 1 Joseph Story, *supra*, §§ 625-29, at 461-63. But Justice Story's predicate is wrong: Article V of the Articles of Confederation authorized States to select delegates by whatever method they chose. Since Article I of the Constitution did not delegate that power to the federal government, the Tenth Amendment reserved it to the States. *New York* v. *United States*, 112 S. Ct. 2408, 2417 (1992). Insofar as Justice Story feared that allowing

2. The drafting history of the Qualifications Clauses supports our interpretation of its text. The original version of the Virginia Plan, prepared by Edmund Randolph, provided that "[t]he qualifications of (a) delegates shall be the age of twenty five years at least, and citizenship: (*and any person possessing these qualifications may be elected except*) * * *." 2 *Farrand* 139 (emphasis added). The Committee of Detail omitted the language making the listed qualifications exclusive before reporting the provision to the Committee of the Whole at the Convention. 2 *id.* at 137 n.6, 178. As reported, the Clause read as follows: "Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen." 2 *id.* at 178. When read against its background, that statement still does not constitute an affirmative expression of exclusivity, as did the earlier version of the Clause. The Committee of the Whole later referred the matter to the Committee of Style, which revised the Clauses into their present, negative form. *Powell*, 395 U.S. at 537. While the Committee of Style lacked power substantively to amend provisions adopted by the Committee of the Whole, 2 *Farrand* 553; *Powell*, 395 U.S. at 538; *Nixon*, 113 S. Ct. at 740, the Committee of Detail already had made the important change by deleting the exclusivity language. Thus, the drafting history of Article I reveals that the Framers did not intend to define exclusive qualifications.

Also relevant in this regard is the drafting history of the Electors Clause, which authorized the State to impose voting qualifications. The delegates considered a property ownership qualification for office, but ultimately chose not to do so.[43] The debate over a property qualification for

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States to set additional qualifications is inconsistent with the nature of a national government, term limits do not threaten the national government, as explained in the text.

[43] After deciding not to incorporate term limits into the Constitution, the Committee of the Whole considered a motion by George

office indicates that at least some of the delegates decided against that prerequisite since it would be impossible for the Convention or Congress to select a uniform rule, *not* since property qualifications were disfavored. Property qualifications to vote or hold office were not repugnant concepts to the Framers; freehold requirements were common in the States. *The Anti-Federalist Papers and the Constitutional Convention Debates* 9 (Ralph Ketcheam ed. 1986); Robert C. DeCarli, Note, *The Constitutionality of State-Enacted Term Limits Under The Qualifications Clauses*, 71 Tex. L. Rev. 865, 879 (1993); Albert Edward McKinley, *The Suffrage Franchise in the Thirteen*

Mason directing the Committee of Detail to draft a clause requiring property and citizenship qualifications for Congress and disqualifying persons indebted to the national government. 2 *Farrand* 121. During the ensuing debate, opponents of the motion argued that it would perversely disqualify those individuals who had contributed to the war effort, that the goal of excluding corrupt legislators was better achieved by imposing appropriate qualifications on the electors, and that any partial list of disqualifications would leave the legislature bereft of authority to establish others. 2 *id.* at 121-26. For example, John Dickenson believed that "[i]t was impossible to make a compleat" recital of disqualifications, that "a partial one would by implication tie up the hands of the Legislature from supplying omissions," and that, as the result, "[t]he best defense lay in the freeholders who were to elect the Legislature." 2 *id.* at 123. James Wilson agreed, saying that "a partial enumeration of cases will disable the Legislature from disqualifying odious [and] dangerous characters." 2 *id.* at 125. The Committee of Detail could not agree on qualifications, 2 *id.* at 249 (John Rutlidge), and proposed a clause stating that the "Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." 2 *id.* at 179. The Committee of the Whole resumed its consideration of the matter by debating a proposal by Charles Pinckney to add specific property requirements. 2 *id.* at 248-49. Gouverneur Morris moved to strike the qualifier "with regard to property," in order "to leave the Legislature entirely at large." 2 *id.* at 250. James Wilson agreed, believing that "[a] uniform rule would probably never be fixed by the Legislature," so that "this particular power would constructively exclude every other power of regulating qualifications." 2 *id.* at 251. The delegates thereafter voted against incorporating a property qualification into the Constitution. *Id.*

English Colonies in America (1905); 1 Charles Seymour & Donald Paige Frary, *How the World Votes* 210-11 (1918); cf. Charles Beard, *An Economic Interpretation of the Constitution of the United States* (1913). That conclusion is significant for the light it sheds on the Convention's decision not to incorporate term limits into the Constitution. The Convention's decision to reject the term limits features of the Virginia Plan cannot be interpreted as a condemnation of that principle because it is equally consistent with the conclusion that the Framers found undesirable the imposition of a uniform rule. Robert C. DeCarli, 71 Tex. L. Rev. at 879-80.

3. Congress also has expressed the judgment that the Qualifications Clauses are not exclusive. Throughout our history, Congress has enacted laws fixing qualifications (or, more precisely, imposing disqualifications) for Representatives and Senators. The First and Second Congresses enacted such laws;[44] Congress thereafter approved state constitutions that impose additional qualifications on Representatives and Senators;[45] and today various criminal code provisions disqualify felons from federal office.[46]

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[44] Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67; Act of Apr. 30, 1790, ch. 9, § 21, 1 Stat. 117; Act of May 8, 1792, ch. 37, § 12, 1 Stat. 281.

[45] After the Civil War, pursuant to the Act of Mar. 2, 1867, 14 Stat. 428, in order to be readmitted to the Union Florida had to obtain Congress's approval of its state constitution. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding*, 2 Stan. L. Rev. 5, 126 (1949). The Florida Constitution of 1868 required Representatives and Senators to have been a state resident for two years, a citizen of the United States for nine years, and a registered voter. Fla. Const. of 1868, § 23. Congress readmitted Florida to the Union in the Act of June 25, 1868, 15 Stat. 73, thereby signifying that Congress saw no constitutional objection to the additional Florida qualifications.

[46] *E.g.*, 18 U.S.C. §§ 201, 203, 592, 593, 1901, 2071, 2381, 2383; see *De Veau* v. *Braisted*, 363 U.S. 144, 159 (1960); see also, *e.g.*, 5 U.S.C. §§ 7324-7327 (the Hatch Act); *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (rejecting First Amendment challenge to Hatch Act).

That long series of acts is strong proof that Congress finds the Qualifications Clauses not exclusive. See, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986).

B. *Powell* v. *McCormack* Does Not Prohibit States From Imposing Qualifications For The Offices Of Representative And Senator

The Arkansas Supreme Court believed that the holding in *Powell* v. *McCormack* answered the question presented by this case, but *Powell* involved a different issue. There, the House of Representatives denied Adam Clayton Powell his seat after his re-election based on Powell's alleged violations of House internal rules. This Court held that the House lacks power to add to the qualifications specified in Art. I, § 2, Cl. 2, when it judges those qualifications under Art. I, § 5. 395 U.S. at 547-48. This case, by contrast, involves a state law regulating access to the ballot, rather than the House's power to adjudicate the qualifications of duly-elected members. *Powell* did not address the power of the States to require candidates for Congress to meet certain conditions under state election law. In fact, this Court acknowledged that Powell had been "duly elected" under New York law, *id.* at 522, without addressing whether the state restrictions under which Powell was elected constituted "qualifications." [47] *Powell* held at most that each House lacks authority to exclude a person who is not ineligible under the Constitution to serve and who has been duly elected under the laws of

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[47] New York law in 1966 included the following requirements: A candidate for the House had to be a registered voter in the State and had to satisfy durational and county residency requirements. A candidate could not have been convicted of any felony or any other infamous crime, and also could not have been adjudged mentally incompetent. A candidate also must have been literate in the English language; he must have satisfied political party enrollment requirements; he must have filed nominating petitions bearing a certain number of signatures as well as statements accepting the nomination and acknowledging his fulfillment of statutory requirements; and he must have satisfied state citizenship requirements. See N.Y. Elec. Law §§ 136, 137, 139, 147, and 152 (consol. 1964) (superceded).

the State that he seeks to represent. This Court's later decision in *Storer* makes clear that *Powell* does not treat all exclusions as "qualifications."

In interpreting Congress's power under Art. I, § 5, Cl. 1, to exclude otherwise qualified Members, this Court in *Powell* relied heavily on the practices of Parliament and colonial assemblies, the debates at the Constitutional Convention and in the States during the pre-ratification period, and Congress's post-ratification practice. 395 U.S. at 522-48. The court below relied on *Powell* and the history it discussed in interpreting the breadth of the Qualifications Clauses. Pet. App. 12a. In so doing, the Arkansas Supreme Court utterly failed to recognize that "historical evidence must be weighed as well as cited." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 752 n.31 (1982). Much of the history discussed in *Powell* is not relevant here, and what is relevant is consistent with our interpretation of the Qualifications Clauses.

The discussion in *Powell* of the precedents expelling members of Parliament and colonial assemblies for acts of misconduct, 395 U.S. at 522-27, is irrelevant to the question whether States can set additional qualifications. *Powell* cited a comment by Alexander Hamilton that "[t]he qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature." *Id.* at 539, citing *The Federalist* No. 60, at 371. The "legislature" to which Hamilton referred is Congress, since the burden of his essay was to show that Congress's power over the "times, places, and manner" of elections could not threaten the union. *Id.* at 540. Indeed, Hamilton's statement cannot be read literally, because Article I did not "define and fix" qualifications of "the persons who may choose"; it left that power to the States. P. 11, *supra*.[48]

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[48] *Powell* also cited similar remarks by James Madison. 395 U.S. at 533-34 and 540 n.74, citing 2 *Farrand* 249-250 and *The Federalist* No. 52, at 326 (J. Madison). Madison's statements also are best

Early cases of contested elections in Congress confirm the Framers' view that the qualifications in Article I were a floor, not a ceiling, and that where the Qualifications or Elections Clauses were silent, state election law must be applied. The early decisions of the House Committee on Elections recognized that the "right to judge, and the rule of decision, are distinct things; and, while the right to judge may be in one body, the prescription of the rule may be in another. The rule, in such cases as these, must be a State regulation, when it relates to points on which the States have exclusive legislation." *Spaulding* v. *Mead* (1805), reprinted in *Contested Elections* 161; see also *Ramsey* v. *Clark* (1789), reprinted at *id.* at 23-37, and quoted at p. 37 n.40, *supra*. With a few possible exceptions,[49] the early House and Senate Committees on Elections did not decide a contested election in a manner inconsistent with the view that the Qualifications Clauses are not exclusive.[50]

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seen as addressed to Congress, as the Court recognized elsewhere in *Powell*. 395 U.S. at 534.

[49] On two occasions in the 19th century, the House faced the issue whether States could add qualifications. In both cases, contestants challenged the election of Representatives who also held state office at the time of election, in violation of state law. See *Turney* v. *Marshall* and *Fouke* v. *Trumball*, reported in Chester H. Rowell, *supra*, at 141-42; *Wood* v. *Peters*, reported in *id.* at 401-02. In both instances, the delegates retained their seats notwithstanding the contrary state law, but dissents in both cases argued that States could impose such qualifications. "To hold otherwise would be to hold invalid provisions in the constitutions of nearly all the States (a complete list of which was given in the report), some of which were adopted before the Constitution itself." Chester H. Rowell, *supra*, at 402 (citing Report of Mr. Bennett). State resign-to-run laws are now deemed a lawful regulation of federal elections. *E.g.*, *Joyner*, 706 F.2d at 1531.

[50] The majority of contested election cases decided in the first fifty years of the Republic concerned allegations of voting irregularities. *E.g.*, *Jackson* v. *Wayne* (1791), reprinted in *Contested Elections* 47-68; *Easton* v. *Scott* (1816), *id.* at 272-86; *Loyall* v. *Newton* (1830), *id.* at 520-600. Other decisions reflect a strict adherence to other *disqualifications* under the federal constitution, *e.g.*, *In re Van Ness* (1802), *id.* at 521 ("The acceptance by a

Powell cited the recommendation of the House Committee of Elections in *Barney* v. *McCreery*, an 1807 election dispute in Maryland, for the proposition that States cannot add qualifications to Article I. In *McCreery*, the Committee recommended that the House admit William McCreery to his seat. The challenger claimed that McCreery had not met the state requirement of residence in Baltimore City, and the Committee rejected that claim on the ground that the Maryland law was invalid. State law required that one of the two district representatives be a town resident, with the other being a county resident. That law, according to the Committee, was "repugnant to the constitution, and therefore void." *Id.* at 167. The full House, however, rejected the form of the Committee's resolution. Based on its own resolution that did not denounce the Maryland law as unconstitutional, the House voted overwhelmingly (by a vote of 89-18) to seat McCreery without a report after it went to considerable lengths to gather evidence on whether McCreery complied with state law. *Id.* at 217-219; compare 17 *Annals of Congress* 882-86 (1807) (Mr. Randolph) with *id.* at 911-915 (Mr. Key), *reprinted in* 2 *The Founders' Constitution* 77-81. What *Powell* did not recognize is that not only did the House reject the Committee's resolution that the Maryland law was unconstitutional, but also that the Committee's resolution itself was aberrant: The resolution was inconsistent with other decisions by the Committee on Elections (as noted during the debates) and with practice before then.

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member of any Office under the United States, after he has been elected to, and taken his seat in Congress, operates as a forfeiture of his seat."); and latitude to the States to experiment with the manner of selecting its federal representatives, *e.g.*, *In re Lanman* (1825), *id.* at 871-76 (although there was no express provision for selection of Senators by State governors when vacancies occur, the Senate Committee of Elections recognized that many states employed this practice, although a governor cannot appoint to fill a vacancy that has not yet occurred).

We end where we began: Term limits and ballot access restrictions are a legitimate, historically-accepted, and judicially-approved means of ensuring that the public receives the benefits of rotation in elected office. Whether they are seen as merely regulating access to the ballot or are deemed to impose qualifications on federal elected office is far less important than is whether they are recognized as being a permissible exercise of the States' power under Article I and the Tenth Amendment to regulate the federal electoral process. History and reason resoundingly prove that they are.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

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